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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

FRITS VANSCHAIK et al.,

Plaintiffs and Respondents,

v.

MAGIC ACQUISITION CORPORATION,

Defendant and Appellant.

B205209

(Super. Ct. No. PC 034595)

APPEAL from an order of the Superior Court of Los Angeles County.

Holly Kendig, Judge. Affirmed.

Kolar & Associates, Elizabeth L. Kolar, Tamara McNulty and Jeanne L. Tollison
for Defendant and Appellant.

Larry Haakon Clough for Plaintiffs and Respondents Frits VanSchaik and Nicole
VanSchaik.

Defendant Magic Acquisition Corporation dba Power Ford Valencia (Magic) appeals from the denial of its postjudgment motion for an award of attorney's fees. Finding no statutory or contractual basis for such an award, we affirm.

BACKGROUND

Plaintiffs Frits and Nicole VanSchaik allege that in 2001 they bought a car from Bob Beaty Ford. When the transmission malfunctioned, the VanSchaiks tried to have the car repaired first at Bob Beaty Ford and then at Magic. According to the original complaint, representatives of Ford Motor Company and Magic eventually told the VanSchaiks that "the vehicle would be taken back as a lemon vehicle," and "a second vehicle would be sold to plaintiffs with specific promised credits." Unfortunately, the second car too turned out to be a lemon. Magic orally agreed to take back the second car in exchange for a third car, which would be sold to the VanSchaiks "for \$100 less than cost" and subject to certain promised rebates and credits. The VanSchaiks allege, however, that the written "purchase agreement" for the third car did not conform to the terms of the oral agreement. They also appear to allege that Magic forged Frits VanSchaik's signature on the written agreement

The VanSchaiks filed suit against Bob Beaty Ford, Magic, and other defendants, alleging claims for breach of warranty under the Song-Beverly Consumer Warranty Act (Civil Code, § 1791 et seq.) and the Magnuson-Moss Consumer Warranty Act (15 U.S.C. § 2301 et seq.), plus a claim for fraud and deceit. The operative third amended complaint includes an additional claim for breach of oral contract based on the oral agreement concerning the exchange of the second car for the third car.

The claims against Magic were tried to a jury, which returned a special verdict in favor of Magic. The jury found that there was an oral contract between the VanSchaiks and Magic but that its terms were insufficiently clear for it to be enforceable. The jury also rejected the fraud claim (finding that Magic made no material misrepresentations and intended to perform its promises) and the breach of warranty claims (finding that the third

car was of the same quality as those generally acceptable in the trade). The record on appeal does not disclose the resolution of the claims against the other defendants.

Magic moved for attorney's fees and costs in the total amount of \$104,284.08. Magic argued it was entitled to attorney's fees both by statute and by contract. The trial court denied the motion, concluding that there was no lawful basis for an award of attorney's fees. Magic timely appealed.

STANDARD OF REVIEW

We review de novo the trial court's determination that no award of attorney's fees was legally authorized. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.)

DISCUSSION

Magic argues that it was entitled to an award of attorney's fees both (1) pursuant to Civil Code section 2983.4 and (2) under the written sales contract with the VanSchaiks.¹ We disagree.

Civil Code section 2983.4 authorizes an award of attorney's fees "in any action on a contract or purchase order subject to the provisions of" the Automobile Sales Finance Act (ASFA). This is not an action on such a contract or purchase order. The only contract on which the VanSchaiks sued was the alleged oral contract, which Magic does not contend was subject to the ASFA. The VanSchaiks' remaining claims were for breach of warranty under the Song-Beverly Consumer Warranty Protection Act and the Magnuson-Moss Consumer Warranty Act. Not one of the four versions of the VanSchaiks' complaint contained any claim based on any contract or purchase order subject to the provisions of the ASFA. Civil Code section 2983.4 is consequently inapplicable.

¹ Magic also argues that it is entitled to attorney's fees pursuant to Code of Civil Procedure section 998. As Magic acknowledges, however, that argument is wholly dependent upon Magic's arguments under Civil Code section 2983.4 and the written sales contract, because a defendant can recover attorney's fees as costs under Code of Civil Procedure section 998 only if an award of attorney's fees is otherwise authorized by contract, statute, or law. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1112-1113; Civ. Proc. Code, § 1033.5.)

Magic argues that the VanSchaiks' pleadings allege conduct that would constitute a breach of duties imposed by the ASFA, so Civil Code section 2983.4 applies. The argument fails because by its terms the statute does not apply to every action alleging conduct that would amount to a breach of duties imposed by the ASFA. Rather, the statute applies to an "action on a contract or purchase order subject to the provisions of" the ASFA. (Civ. Code, § 2983.4.) This is not such an action.²

Magic also contends that the written sales contract warrants an award of attorney's fees because it provides: "You may have to pay collection costs. You will pay our reasonable costs to collect what you owe, including attorney's fees, court costs, collection agency fees, and fees paid for other reasonable collection efforts." (Bold omitted.) The argument fails for three reasons.

First, Magic provides no citation to the record for the quoted language. "[A]ny reference to a matter in the record" must be supported "by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C).) By failing to provide such a citation, Magic has forfeited the issue. (*In re S.C.* (2006) 138 Cal.App.4th 396, 406-407.)

Second, we have independently examined the record on appeal and have found that the copy of the written sales contract attached to Magic's motion for attorney's fees contains neither the quoted language nor any other attorney's fees provision. The other copies of the contract in the clerk's transcript likewise contain no such provision.

Third, assuming for the sake of argument that some other portion of the contract, which was neither submitted to the trial court nor reproduced in the record on appeal,

² Magic cites *Brown v. West Covina Toyota* (1994) 26 Cal.App.4th 555, for the proposition that Civil Code section 2983.4 applies to any action alleging a violation of a duty under the ASFA. That case did not so hold. Rather, the court found the statute inapplicable in that case because the complaint did not "seek vindication of any rights" under the ASFA and did not "state a claim for relief" thereunder. (*Brown v. West Covina Toyota, supra*, 26 Cal.App.4th at pp. 563-564.) The VanSchaiks' pleadings likewise do not seek vindication of any rights under the ASFA or state any claims for relief under the ASFA. Thus, under *Brown v. West Covina Toyota* (which we note was disapproved on another ground in *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 996), Civil Code section 2983.4 does not apply here.

does contain the quoted attorney's fees provision, the argument still fails because the provision allows only for an award of attorney's fees generated by Magic's "reasonable collection efforts," if any. This is not a collection action by Magic, and the briefs cite no evidence that Magic has undertaken any collection efforts at all or has ever had occasion to do so.³ In the absence of any collection efforts by Magic, the quoted attorney's fees provision is inapplicable.

For all of the foregoing reasons, we conclude that the trial court properly denied Magic's motion.

DISPOSITION

The order is affirmed. Respondents shall recover their costs of appeal.

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ROTHSCHILD, J.

We concur:

MALLANO, P. J.

WEISBERG, J.*

³ To the contrary, in their respondents' brief the VanSchaiks contend (without citation to the record) that "[a]ll payments on the contract . . . were and continue to be made" and that "[t]here was no default on a written contract." Magic does not challenge those contentions in its reply brief (with or without citation to the record).

* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.